

Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American Government and offer contexts around the effects of government agencies in your everyday life. Now your hosts, Nia Rodgers, Public Affairs Librarian and Dr. John Aughenbaugh, Political Science Professor.

Nia Rodgers Hey, Aughie.

John Aughenbaugh Good Morning Nia.

Nia Rodgers How are you doing today?

John Aughenbaugh You already got me laughing so it's gonna be good.

Nia Rodgers Well, okay. So what I've decided, is that like President Trump. I'm not going to accept the peaceful transition of power. This election season. And I'm not going to accept the election, no matter how it turns out. I figure that's the best way for me to just say, I don't believe in the election certification process and then have you proved me why I'm wrong. Ah, you laugh. That means you can't, I win. Podcast over

John Aughenbaugh So listeners nears actually adopting a new approach which is she's thinking out the null hypothesis and then daring me to come up with evidence for the actual hypothesis. This is a different strategy in regards to our discussions, so well done Nia. I appreciate this.

Nia Rodgers I'm trying to shake it up a little. Keep you on your toes.

John Aughenbaugh Yeah but listeners today. Our topic is one that I and other scholars do suspect we will have plenty of discussion once the election actually occurs.

Nia Rodgers Well can I say that that's a gentlemanly way to say that we're going to have plenty of discussion. Considering that myview of it is, we're going to have plenty of Armageddon to go around. After the election. So, in all seriousness, we're not going to know the results on November 3rd are we?

John Aughenbaugh No. I, I would be surprised. I'm...

Nia Rodgers Unless it's a humongous landslide one way or the other, right?

John Aughenbaugh We're not right. I'm in. There are a number of reasons for this. The main reason is that most voting behavior experts and scholars are predicting an extraordinarily high number of Americans are going to vote by mail.

Nia Rodgers Okay. Okay, so let's start at the beginning. So voting day is always the first Tuesday after the first Monday in November, that's set in the Constitution.

Nia Rodgers Yes. And in our case, this year, that is November 3rd, 2020.

John Aughenbaugh That is correct.

Nia Rodgers That that is technically what we're calling election day, meaning your polls must be open that day in order for people who want to go vote in person.

John Aughenbaugh That's correct.

Nia Rodgers Yeah, so what the states have done in in the land of COVID right in this time is they have they have made absentee balloting I think easier in some states right like like you can get a ballot more easily. I know in Virginia used to have to give a reason for wanting an absentee ballot. You couldn't just say, because I don't want to go to the polls that day, because I don't feel like it. Right. Like, that's not you had to either be living somewhere else or you had to be taking care of someone who was sick or something, there had to be a reason. And they sort of taken away that part.

John Aughenbaugh Yeah, a number of states like Virginia have made it significantly easier to one get an absentee ballot and then two actually submit your vote that way. Okay.

Nia Rodgers Well, I'm going to argue that easier is a relative term here, considering that you have to, in some states, you still have to have a witness, in some states, you have to put it in the naked envelope before you put it in the final envelope. I mean, I'm not... given the arcaneness of some of the laws... And in fairness to the laws they weren't expected to be used as heavily as they're going to be used this year. Like normal ballot levels are pretty low, right?

John Aughenbaugh Small yes so

Nia Rodgers Most people vote in person day of like what we think of is normal voting and I'm putting air quotes around that which listeners can't see but

John Aughenbaugh What it's voting in person is long been viewed as part of the voting ritual.

Nia Rodgers I get up at am and I go over to my polls and I say hello to my nice little old ladies who work there and they check me off on the master list. They have a big ledger. And they checked me off on the master list and they give me my ballot and they tell me what to

do. Even though I've done it 10,000 times and I fill out my ballot and then I go around to the guy and he watches me put it into the machine and then he gives me my I voted sticker.

John Aughenbaugh Yeah.

Nia Rodgers I mean like it's a whole thing right.

John Aughenbaugh And like you, for the last seven years, I wake up Mackenzie, I get her dressed. Okay, get her fed and then we will go vote together right

Nia Rodgers Oh, so she's been voting forever.

John Aughenbaugh She's been voting forever. Right. And, like you, okay, we've been going to the same place all seven years, but okay. They know me and my daughter. They've heard my daughter, go ahead and say, you know, more people would vote if you had coffee and donuts here. Right.

Nia Rodgers Or candy. Hello.

John Aughenbaugh Oh, she's not. She's not into candy. She likes donuts.

Nia Rodgers Oh, and of course coffee because she's your child.

John Aughenbaugh Yes, she's just like, you know, my daddy dude and more people like him would vote more often. Like Mackenzie, we can only vote once a year. Okay. Okay. John Aughenbaugh And then I go ahead, we'd

Nia Rodgers Come here a lot more often if you had coffee and

John Aughenbaugh Okay, um,

Nia Rodgers It. Yeah, that's an interesting strategy for campaigns to engage in.

John Aughenbaugh It's the same. It's the same volunteers. Right. It's the same ladies, they do the exact same thing that you just described. They look me up on their ledger or on their computer screen. Okay. They mispronounce my last name. Okay, even though they see me. I mean, I know these people. Right. Um, you know, then we go to the machine. I fill out the ballot, then just like you. There's an elderly gentleman who watches me slide it on in so it gets scanned. Okay.

Nia Rodgers And you see the number go up. So that you know it's gone into the machine.

John Aughenbaugh That's right. And then he gives me a nice little receipt and then we get to choose our stickers. Okay. I don't wear them okay but Mackenzie, does she probably wears her I voted sticker. Right.

Nia Rodgers Good for her.

John Aughenbaugh Yes, right. On the other hand, as you just pointed out the states have different laws in regards to what is expected of voters who vote by mail. Okay, who vote by mail and she just gave one of the examples. My home state of Pennsylvania, much like Virginia require you that when you vote by mail after you fill out the ballot. You play that

Nia Rodgers And sign it.

John Aughenbaugh Okay, we'll give that

Nia Rodgers Since that is a huge problem.

John Aughenbaugh Okay, we'll get to that in just a moment.

Nia Rodgers Okay.

John Aughenbaugh I was just focusing on the dual envelope issue.

Nia Rodgers Oh, I'm sorry. Go ahead.

John Aughenbaugh Okay. So, Virginia. Like Pennsylvania and a number of other States after you filled out the ballot, then you stick it in. Okay. A blank white envelope on the back is where you have signatures that are required. Now, Nia and I before the podcast began a recording this morning. We're looking at the mail ballot procedure here in Virginia. And one of the things that could be confusing is the fact that, on one hand, the instructions you get with your ballot say that after you votes and you put it in the envelope you must have a witness over the age of okay that will affirm that they watched you vote that it was actually you who cast the ballot. On the other hand, on the website. Okay. And also, and now I found it right down at the bottom, it says unless you believe you may not safely have a witness present while completing the ABSENTEE BALLOT FOR THE NOVEMBER elections envelope B must be fully completed, including both the voter and witnesses witness signatures on your or your ballot cannot be counted That seemingly suggest you don't need to have a witness. On the other hand, okay.

Nia Rodgers Yeah. It's confusing to save it. It is not confusing would be silly. It's confusing. And if you are a person who either didn't notice that at the bottom right, but you live alone and now you're panicked because you don't have a witness to your ballot and because

we're uncovered. We're being told not to just randomly go to people's houses and hang out and do stuff with them. Then what do you do, right, like it's it. So I think there's going to be huge confusion about that and you were right to say that that's a separate issue because the signing thing is a normal issue with ballots with absentee ballots, which is like normally bunches and bunches of people forget to sign them. And folks, it's a legal document, you have to sign it.

John Aughenbaugh Yes.

Nia Rodgers If you don't sign it, it doesn't count. You might as well mail them an envelope of confetti because it's going to mean the same thing to the registrar. It has to be signed, because it's a legal document.

John Aughenbaugh And guys, this is what causes, if you will, confusion and controversy in regards to county balance. Okay. Because if you don't follow the instructions, no matter how arcane, no matter how confusing. They may be if you don't follow the instructions. Then you give some Clerk. Some bureaucrat okay a reason to discount your ballot. Okay. Um, this, that is, if you will, the case backs of landmark Supreme Court decisions. Right. Okay.

Nia Rodgers Oh my goodness. Are you going to bring up Bush vs Gore with the hanging, the hanging chads?

John Aughenbaugh Yes, right, trying to figure out

Nia Rodgers Well, and what what we're encouraging you to think about is do not leave your intent in question.

John Aughenbaugh Yes.

Nia Rodgers You know you want to vote a certain way do as much as you can to leave your intent clear whichever way you vote, we're not telling you how to vote because that we are not in the business of doing that. What we're saying is sign the dang thing. Put it in the right envelope and send it because you want to make sure that your intent is clear, I wish to vote, and I wish to vote this way.

John Aughenbaugh And in, in, in Virginia, like, Pennsylvania. There's two envelopes, you stick your ballot in the one envelope and on the back of that envelope is where the signatures go but then you go ahead and stick that envelope into the envelope that already has the postage, which will send it back to the office of voter registrations and elections. Okay, um,

Nia Rodgers If you're worried about that. You can drop it off. You can be office of voter registrations. Actually, I think in Virginia. There's three places in Richmond.

John Aughenbaugh Yes.

Nia Rodgers Where you can drop it in different places in in Virginia, you would need to look that up. And same with other states. There are ways that you can turn them in most of the time in person. If you want to physically go and drop something off to someone

John Aughenbaugh It is so... What we're getting at here is the first date. November 3rd okay is Constitutional right knee is laid out, you know, it's got to be the You know, what is it the first Tuesday after the first Monday, blah, blah, blah. I mean, the date gets chosen. Okay. We know that that's election day, right. But how you vote will vary in in this year, you know, in this year's election we know there's going to be more people voting by, by mail. Right. Okay. So there are a number, if you will, topics that we're going to try to go ahead and fit into this podcast episode. All right. Because we want to avoid Nia Okay, being able to claim that the vote count is illegitimate and should not be followed. Right. Because now, at that point, then we would have a constitutional crisis. Okay. And we don't want Nia leading the charge of saying okay...

Nia Rodgers It was an illegitimate election.

John Aughenbaugh Right.

Nia Rodgers Oh,

John Aughenbaugh Anarchy rules.

Nia Rodgers That's right. I'm in charge, forever.

John Aughenbaugh You know, storm the Bastille, we have a revolution.

Nia Rodgers But there are some dates that are kind of set out as a sort of a they are immutable right they're, they're, well not immutable because they're in law and they can be changed. Yeah, so there is a law. They're not just made up on a whim.

John Aughenbaugh So there are two dates that are constitutional one is the actual date of the election for federal offices. Okay. The second. Okay. Is the date that the President gets inaugurated. Okay, that's January 20th. Those are the only two dates that are in the Constitution. The rest of the dates that I'm going to mention are actually written into law, which means they could be changed. In fact, they could be changed before the November election if Congress was so motivated. I don't think that that's going to happen. Okay.

Nia Rodgers I don't think that Congress could agree right now to stand in a circle and sing Kumbaya

John Aughenbaugh Well, right. Okay, I mean if we asked them to go ahead in line up. Okay, they would have a debate as to whether or not they should do it by height, weight, age, okay...

Nia Rodgers Service length. Alphabetically. y'all yeah yeah right by the State says they came into the Union like... It would be, it would be a mess. It would take us a month that to get settled.

John Aughenbaugh We have the election on November 3rd according to federal law. Okay. And I want and I want to get this correct so Nia can put this on their research guide. Okay, the law in question is, but but that that, uh, I know I mentioned it in my prep materials. Nia. Do you remember the name of the law? I'm thinking out loud here. It's the law that was passed after the disputed 1876 election. I know I mentioned in my... Okay, I'm going to find the law. Okay. Oh, it's the electoral count act of 1887. okay the electoral count act of 1887. so after after the election. On December 8th, states must determine their election results. Okay, so basically they have a little over a month okay to count their ballots. If they count their ballots and they certify the vote counts by December 8th, okay, whatever they decide in regards to the Electoral College must be accepted by Congress. This is known as the safe harbor provision of the electoral count act. Okay, so if a State can get their act together and count the ballots and certify whoever won in their state by December 8th, then, Congress has no choice but to go ahead and accept okay I'm their electoral college vote.

Nia Rodgers They got themselves together and did it in the time allotted

John Aughenbaugh That's right. Okay.

Nia Rodgers And we're going to get to a case where that didn't happen. Are you going to talk about that now?

John Aughenbaugh Well, we can get to it. Now if you want to do.

Nia Rodgers So in Bush v. Gore. The problem with Florida was that they weren't that they were running over that. Right. They weren't certifying the election or they didn't think they were going to finish in time. Because of what we were jokingly referred to earlier is hanging chads so they had a system by which in many counties. When you voted. You punched through a piece of paper with a metal punch like you went in and you push a

button and punched through this piece of paper and theoretically that was next to the person's name that you wanted to vote for, for whatever office.

John Aughenbaugh Yeah, computer punch card. Yeah.

Nia Rodgers And the problem with that was it. Sometimes they got off in the machine. They were next to a person and you couldn't tell whether they meant one person or another and then sometimes they didn't punch, all the way through, because they weren't sharp enough so there would be what they call the hanging chad the thing that falls, the whole that the the piece of paper that falls out when you make a hole in something is called the chad. And if you don't punch, all the way through it sort of hangs there by literally a little paper thread. And so people were holding them up to the light.

John Aughenbaugh And then you had you had pregnant Chad's

Nia Rodgers Oh that's right where they were punched out. I mean, they were they were fat on one side, but not punched all the way through.

John Aughenbaugh Yeah, there was an indentation that look like okay the pregnant belly of a woman on the backside of the sheet of paper right

Nia Rodgers And they were trying to hold those up and figure out which person that was next day and then some in some of the ballots wasn't, it was it Pat Roberts. No. Was it Pat Robertson?

John Aughenbaugh Pat Buchanan

Nia Rodgers Pat Buchanan and thank you. Wrong. Wrong Pat Pat Buchanan was across from or next to our somehow it ended up being that some people who said they were trying to vote for Al Gore actually punched next to Pat Buchanan and there were all kinds of drama. Right. Okay. And it was on the nightly news every night, they'd show those poor people working the polls, trying to figure out where things were. And then the observers from both campaigns. Because Florida was going to decide the election.

John Aughenbaugh Yes, because

Nia Rodgers It was up to Florida.

John Aughenbaugh Because the other states had already counted. Okay, their ballots and we knew that in regards to the Electoral College. Okay, what whoever you know, whichever candidate won Florida okay would get the necessary majority votes in the electoral college,

it came down to one state. And the way Florida did the recount okay this was a very time consuming process.

Nia Rodgers It was a recount right because it was too close to call

John Aughenbaugh Yes, Florida, like many states has a mandatory recount threshold if the margin of victory is within a certain, if you will, percentage, right. And it varies by states, right. So there was a mandatory recount the issue was how were each of the counties conducting the recount okay?

Nia Rodgers And was a whole thing.

John Aughenbaugh It was a whole thing and this becomes a significant issue and Bush versus Gore because when Florida was because Florida was still doing the recount by the safe harbor date in the electoral count act, the United States Supreme Court voted that Florida had to stop there recount otherwise. Okay, no matter who Florida report in one the Electoral College, it would lead to a challenge of, okay, Florida saying this presidential candidate won my state.

Nia Rodgers Right.

John Aughenbaugh The next deadline is December 14th. That's when the state electors must convene in their states to cast their votes for president and vice president. So in other words, December 8th okay is the date that states basically got to get their act together and say, here's the vote count. Six days later, that's when they hold their electoral college vote within their state. Once they hold that vote, their electoral college if you will vote is then sent to the Congress. On January 6th Congress needs to either accept okay or actually count electoral college votes right now in most instances, Congress. It's pro forma. It's a ritual. Okay, because the Electoral College vote in the country is pretty clear. Okay, it's pretty clear right. Now, The Senate President convenes both houses of Congress to open the state certified electoral college votes, the Senate president is vice president Mike Pence.

Nia Rodgers For this election.

John Aughenbaugh For this election.

Nia Rodgers Right.

Nia Rodgers Always the Vice President.

John Aughenbaugh It's always the Vice President. Right.

Nia Rodgers Which is nice, the Vice President gets to do something. Like this, you know, a lot of times, the Vice President's job isn't super...

John Aughenbaugh Oh, that was that was what so much condescension...

Nia Rodgers Sorry.

John Aughenbaugh Oh, that's nice. They get do something right you know it's like that family member, a big family dinners during the holidays. Oh, let's let's look let's let them go ahead and give the toast, because otherwise we're not going to listen to them. The rest of the dinner. So, you know, hey, If they want to go ahead and click the glass and say, Hey. Welcome. It's good. Glad to have all the family members share and You know, it's really a shame that and so and so, died this past year hanging, but the rest of us are here. So that's nice. And then basically the rest of the dinner. We don't like pay attention to them. That's the tone that you...

Nia Rodgers I'm just saying that the Vice President's job in many cases is to wait around and make sure that The President survives their presidency like it you know you're a lot. You're pretty ceremonial, you do a lot of ceremonial stuff. Unless you are certain vice presidents, we've had. I mean, one could argue Dick Cheney was not that kind of vice president but, but for the most part, unless the president asks you to head up a task force or do a very specific public thing you're kind of just chillin like that. The point of you is to chill. Yeah. I like that. They give them something to do. And this is actually really important right, they they show up...

John Aughenbaugh Potentially extremely important because if the Electoral College vote is close or if there are allegations a vote count up irregularities, the Senate President has the authority to reject any State's electoral college votes.

Nia Rodgers Have they ever done that? I mean, can you imagine if Mike Pence to said, well, California has been on fire. So I'm not going to take their electoral votes.

John Aughenbaugh For whatever reason, right.

Nia Rodgers Hey, oh my gosh, the earthquake that that would cause in Washington would be... Well, and what you'd never get away with that politically that like that would just be.. That would be bonkers. Okay, but

John Aughenbaugh It doesn't stop with just the Senate. Okay. The speaker of the house. Okay, per the electoral Why not keep on blanking on the name of this law, the electoral count act of 1887 okay the Speaker of the House could refuse okay to allow the house be

called into session. If that happened, then the Electoral College votes would not get counted at all.

Nia Rodgers So they're not just counted in the Senate. They're counted in the entire Congress

John Aughenbaugh Congress. It's a joint session of Congress. Okay.

Nia Rodgers Hahaha oh I'm beginning to see a nightmare scenario in front of me.

John Aughenbaugh Oh hey gets even better.

Nia Rodgers No, no, I can't. I can't hear anything else, because I can see how the strong... Okay, go ahead.

John Aughenbaugh According to another law, the presidential Succession Act of 1947 okay If neither the President or the Vice President can serve, then it's the Speaker of the House who becomes the acting president. So in the scenario that we are laying out. Okay.

Nia Rodgers Wait so Pence says, I'm not going to take California. Nancy Pelosi says, I'm not calling the house into session. And then she declares herself acting president

John Aughenbaugh Because at that point.

Nia Rodgers Okay. Is that not a coup?

John Aughenbaugh Okay. But at that point, understand. Technically, the Electoral College votes have not been counted. So therefore, we do not have, according to the United States Congress. Okay.

Nia Rodgers An elected president. President, if you don't have an elected president, vice president it goes to the speaker. Oh my goodness. And Mitch McConnell's hair would fall out in clumps immediately.

John Aughenbaugh Well, not only would Mitch McConnell's hair fall out in clumps, think about what the reaction would be by President Trump.

Nia Rodgers Well, and, frankly, think about what the reaction would be in the streets, I mean that that is what that is at that point. That's a failure of democracy, like that's a failure of the American system, we would in fact never be the same country again after that.

John Aughenbaugh Yes.

Nia Rodgers So they will not do that if they can possibly avoid doing that because it will destroy the entire system in which they operate.

John Aughenbaugh That's why the...

Nia Rodgers But that is a nice check and balance on that Vice Presidential because that person is often an incumbent. And so that's a I mean you have to admire this sort of again coming back to the idea of the government is constantly trying to balance itself with against tyranny, against one person's tyranny.

John Aughenbaugh And that's why the December 8th and December 14th dates are so important. Because they force states to get their act together and count the votes. It forces state court systems. Okay. To, you know, if you will apply state laws regarding you know who voted and whose votes can be counted and it requires states then to go ahead and come together and say, we have a vote count that we've accepted and per bar if you will state constitution or state law. This is the candidate who receives our States electoral college but

Nia Rodgers Well, and it also does that with alacrity, because as we have discussed in the past, the court system can in fact move extraordinarily slowly at times. But this says no within a month of the election, more or less. I mean, it's a month in a week, but within five weeks of the election, you need to have this done. Because we need to not be wondering into late December early January, who the next president is going to be that needs to be settled in part, I think you've mentioned because they need the transition time.

John Aughenbaugh Oh, it's extremely important in regards to presidential transitions.

Nia Rodgers But it's also important that the public have that settled. One way or another, and get over whatever has made you upset about the election. Because somebody is going to be upset. Every time there's an election somebody loses. And that's frustrating and you need time to sort of, okay, I'm going to process that and get over it because we got to move forward. We got to move forward with this person, whether I like them or not and see what I can do to work with them. So I mean in the ideal world, that's what you're doing.

John Aughenbaugh And we've already mentioned two presidential elections, where that processing time did not occur. And I'm going to go in reverse chronological order first Bush versus Gore which Nia and I've already referenced. For many of our younger listeners, you may not have been born or you were extremely young when the presidential election occurred, but because of what was going on in Florida. Okay, and their difficulty and counting and recounting ballots. We did not know until the, the, the, like, the day before the safe harbor deadline, who actually won, Florida. That was one of the longest months, okay,

at least for me, and many Americans in regards to okay what's going on in the country. Okay, what's actually going on in the country. Because we didn't know who won the presidential election. Okay, you had both political parties that were throwing accusations at one another. I would posit it helped, if you will, ratchet up the partisanship that we have seen in the last two to three decades in this country. Because a lot of the allegations that were made in court. Okay, and Nia and I've talked about this when you take a dispute to court. There is a winner and a loser. And there's oftentimes very little middle ground or compromise right. So for many Democrats, for instance, the Supreme Court ruling that stopped the Florida State voter a vote recount was a stolen election. Right. They feel it as the stolen election.

Nia Rodgers And the carry on effect for 9/11 was the Bush was president and not Gore. And so there are people who who have a lot of feelings about how that might have been different, or handled differently or whatever. I think that all of that is completely speculative and there's no way we could ever know. But what I do think that it did was have a huge effect on how people view the importance of the court in elections, like it and listeners will have heard last week our discussion about, Justice Ginsburg. And Justice Ginsburg replacement on the court. And one of the selling points for both sides is let us avoid another situation like Bush v. Gore right let's avoid having the courts decide or if the courts are going to decide let it be decided in our way and not the other way, whichever the "our" is in this particular instance, because both sides feels like they have a dog in that fight. It's wrong. And, and, frankly, that that election was seen as decided by the nine members of the Supreme Court.

John Aughenbaugh That's right. And so, you know, that's one election. The other election where the country did not know four weeks afterwards, was the 1876 election that led to the electoral count act okay of 1887. In the presidential race was between republican Rutherford B. Hayes and Democrat Samuel J Tilden okay.

Nia Rodgers And since I've not heard of Tilden I'm sure that Hayes is the one that won that election.

John Aughenbaugh That's right.

Nia Rodgers Because when I'm thinking through the list of presidents in my head Hayes is on there. And Tilden is not.

John Aughenbaugh What. That's right. In that particular election, you didn't have one state, okay that had vote irregularities, you had multiple states who actually submitted multiple different electoral count results to the Congress. Okay.

Nia Rodgers Wait, I don't understand.

John Aughenbaugh Okay, again before the electoral count act. Okay, it was up to the states to decide what they were going to submit to Congress in regards to their state's electoral votes.

John Aughenbaugh And in some states okay if okay was the state legislature and other states. It was the executive branch, you know, the bureaucrats who did the, if you will, the counting, okay, but in some states, you actually had state legislators who said no our reading of the vote in this state is that this candidate one, but then you had the executive branch say no are reading is it's a different candidate.

Nia Rodgers Oh, so it was unclear.

John Aughenbaugh Yes, so the state's submitted different

Nia Rodgers They submit a twice, they voted twice, which as we've discussed before, is not legal in this country.

John Aughenbaugh Not good.

John Aughenbaugh Not good, not good for states to do it not good for individual is

Nia Rodgers No, nobody should be voting more than once. Okay. Oh, I see. So that would make it really confusing because then the Congress would have to decide who was the more legitimate representative of that election, the elective body in the state or the executive in the state.

John Aughenbaugh That's right. So this led to...

Nia Rodgers And I'm sure there was no partisan politics involved.

John Aughenbaugh Well, and

Nia Rodgers She. she said, sarcastically

John Aughenbaugh Ugly right. This led to the United States Congress, creating a Commission that was comprised of five House members, five US senators and five Supreme Court justices. And interestingly enough, okay. The vote was eight to seven. For Hayes. But as part of the deal too if you will settle the election. Okay. Hayes, it has been alleged by historians, agreed with southern Democrats to end Reconstruction. So when Hayes became president that that's when you had the removal of federal troops from the South.

Nia Rodgers So he traded for the election.

John Aughenbaugh Yes, he did. Okay, yes.

Nia Rodgers That's a little crooked.

John Aughenbaugh It's a lot crooked. Okay.

Nia Rodgers I was trying to be nice.

John Aughenbaugh Okay, but those are the deals that are made to go ahead and end election disputes. Right.

Nia Rodgers Well yeah, I mean, Nixon had a southern strategy that was based in race. Well, that's not an unusual thing for for a candidate or a or an individual to say I'm going to try to chunk of my soul in order to get the White House and, and some of it they, they justify to themselves based in but I'll do good things when I get there, or I'll you know I'll help these other people when I get there.

John Aughenbaugh Yeah, I mean, you have discussed this. And in fact, in some cases, recent podcast episodes. Right. Okay. The, the kind of value compromises the get made by candidates. Loved ones staff members voters because we believe that a particular candidate. Okay. No matter their pathologies, no matter how corrupt. They may be okay if they're in office will be able to do good things, they'll be able to do good things.

Nia Rodgers Did Tilden fight it?

John Aughenbaugh I know Tilden to his credit, just like Al Gore, to his credit in 2000, okay accepted the results. Tilden accepted the results of the Commission, just like Al Gore accepted the Supreme Court decision in Bush versus Gore.

Nia Rodgers Well, and I assume for similar reasons, right, because Al Gore said this is tearing the country apart and we got to stop and I'm assuming Tilden right after the Civil War would have probably felt a similar pressure of. We just need for this to not be a thing right now.

John Aughenbaugh Yeah. And as I tell my students, I mean the 1876 election. Okay, was a mere 11 years after the end of the Civil War. Right. It's not like the country was over it.

Nia Rodgers Okay, we're all healed, blah, blah, blah. I mean, yeah, no.

John Aughenbaugh I mean, you know, think about. For instance, how we today. Okay, you know, in a, you know, two centuries removed, if you will. Okay, at least a century and a half removed are still dealing with the implications of slavery and the civil war in this country. You don't get over that. Right, you know, get over it, they

Nia Rodgers 20 years after Bush v. Gore, there are still hardcore democrats who will say it was stolen and it ruined the country. And you know what I mean, like, they

John Aughenbaugh Oh, yes.

Nia Rodgers It's like it happened yesterday. Oh yeah, I was angry at the beginning, in part because not because I loved Al Gore, but because I wanted the process to finish. And I felt like it wasn't finished. Right. They didn't finish the count because it was stopped. But looking back on it, my, my adult older self says that was the best choice, the best choice was to just finish this as quickly as possible so that one there could be a peaceful transition of power, which is enormously important in the United States, but also so that we, we could stop fighting about it like. There's only so much fighting that should be going on. And then we should stop, which is part of what bothers me about current politics is there's an awful lot of fighting about things that probably don't need to be fought about.

John Aughenbaugh Well, it ended not stopping the fight. We hurt governance.

Nia Rodgers Right, we hurt the institutions.

John Aughenbaugh Okay, I mean remember at the end of the day, or at its core, elections are choosing people to run the government.

Nia Rodgers Right.

John Aughenbaugh We are picking people to represent us in governing institutions. If we don't stop the fight about the election, then governing gets delayed; it gets hurt. Okay.

Nia Rodgers Which eventually hurts us

John Aughenbaugh Like it's a yeah

Nia Rodgers It's a cyclical thing.

John Aughenbaugh Yeah. Right. Okay. Um, and that's where you know many And I don't necessarily such you know i mean this week that we're recording this podcast episode listeners. Nia started off the episode by making reference to the fact that she was going to

follow the lead of the current president who has refused to say if he would accept okay the outcomes or the outcome of the election.

Nia Rodgers Actually, what he said was, I'm sorry, but what he said, which I find more terrifying is he said he wasn't sure about the peaceful transition of power.

John Aughenbaugh Yeah, the peaceful. Yeah, okay.

Nia Rodgers Like, whoa, whoa, whoa, whoa. That's the phrase that we have depended on as a nation for 200 plus years is whether you hate your opponent or not. If your opponent wins you grumbling or graceful walk away without trying to have a coup like... that's what you know. Yeah, and I'm like, if nothing else pro forma you should say, of course, I believe in the peaceful transition of power. Although whatever else. One may say Donald Trump doesn't always say the easy thing, does he?

John Aughenbaugh No, I mean it. And I understand many of his supporters are like, you know, hey, he says, oh wow what many of us think, okay, that's fine. Okay. But if somebody and I have been chastised throughout my life for occasionally and Nia is getting a really big grin on her face right now folks for occasionally same things. Okay, that perhaps you're not be said, but a lot of people in a room were thinking.

Nia Rodgers Yeah, you

John Aughenbaugh Yes, I know, right.

Nia Rodgers Pshaw, say it isn't so

John Aughenbaugh So this definitely falls into the category of Do as I say, not as I have done. Okay, or perhaps will do in the future. That kind of talk is very disconcerting.

Nia Rodgers Yeah it disconcerted me because that's different than saying, Will you accept the outcome of the election, maybe he could legitimately say I would fight. The outcome of any election I didn't believe was fair and and I would say, Okay, that's not an illegitimate position to have, but to say, I don't know if I believe in the peaceful transition of power. Or I'm like, Whoa, whoa, whoa, whoa, that's that's, that's a completely different animal to me. I was really taken aback by that.

John Aughenbaugh Because you know for many of us.

Nia Rodgers I shouldn't have been. But I was

.

John Aughenbaugh What was noteworthy and what was good about the American form of democracy in 2000 was that there was a peaceful transition That Al Gore conceded boy Bush okay was very conciliatory when he first took office. And he was right. He didn't gloat Okay. Right. Okay. And Look office and he started running the government and whether or not you believe that Bush actually won the election. Because he did win the election he was running the government and though the decisions of the Bush administration were viewed as legitimate because he won the election elections legitimize those who are in positions of authority in governing institutions.

Nia Rodgers And I, I would agree and argue that also Al Gore's acceptance of the decision also legitimized President Bush. As a president like He came out and said, President Bush is our president, and we should give him as all all of our support, as Americans like it was a thing for him to be. It was very state, you're right. Very statesman moment. For Al Gore when he was like, we don't get we don't get to be angry and bitter and not support the president because we don't like the way this went, That's not okay. And and that I agree with you helped legitimize his presidency and then helped him through harder times when we had 9/11 and we had Katrina and we had other issues with the recession during his presidency, he had a foundation of yes but we've all accepted that you're the president.

John Aughenbaugh Yeah okay um but I'm not entirely sure we either political party is going to be all that accepting.

Nia Rodgers Right, right. I'm worried about both sides because we're not at this point, you couldn't if I threw a rock in Washington. I wouldn't hit a statesman or stateswoman for love nor money I could throw a billion rocks and not hit any it's very frustrating to me that... That we have now devolved into such a hardened, politicized. Right. I don't even know what the word would be separated...

John Aughenbaugh Yeah, there's no common ground here. Okay. I mean, in in folks, if you think about democracy, but in particular the American form of democracy, it can only function when Common Ground is achieved.

Nia Rodgers Compromise. In the entire democratic process is based on compromise.

John Aughenbaugh Whether you're talking about separation of powers federalism checks and balances okay elections. Okay, and what you know elections mean in terms of governing. If we cannot find common ground that it's almost impossible to go ahead and run a country in a democracy. Okay. And that's extremely problematic.

Nia Rodgers Right.

John Aughenbaugh It's extremely problematic, right.

Nia Rodgers So given the givens of the polarization

John Aughenbaugh Yeah.

Nia Rodgers How do we prevent the pence Pelosi standoff of I'm willing to burn into the ground in order to get it for my side...

John Aughenbaugh Okay.

Nia Rodgers nightmare scenario that we had that that you've so frighteningly given me to think about and not sleep over for many, many nights for the next few weeks. Thanks for that.

John Aughenbaugh The most I think the most obvious answer to your question is if there is a landslide right. If one candidate wins by a landslide, it would be next to impossible for the loser to go ahead and say this election was stolen from me and my supporters. Okay. Okay. Um, and that's always been the..., the value of a landslide, which is it really undercuts you know any, if you will, claims that votes weren't counted correctly or that there was voter fraud...

Nia Rodgers He takes the whining out of the election.

John Aughenbaugh Oh, sure. Okay.

Nia Rodgers If it's if it's 60-40 it wasn't close

John Aughenbaugh It was not close

Nia Rodgers And there's no

John Aughenbaugh Was some voter fraud.

John Aughenbaugh Or an election chicannery, if you will.

Nia Rodgers Make a difference.

John Aughenbaugh It wouldn't make a difference. Yeah.

Nia Rodgers Maybe if it were 10 on either side. Well, no five on either side 5% on either side, you still aren't getting

John Aughenbaugh Yeah, okay.

John Aughenbaugh I'm in. Historically, and I've told you this before Nia historically political scientists have acknowledged that in most presidential elections. Okay, there's usually one to two%, if you will, voting in vote count irregularities, but one to two % okay in nearly all the states and a nationwide isn't going to impact, if you will, an election. On the other hand, if it's extremely close, then you get, you know, the court cases, then you get the allegations of you know of votes aren't being counted, then you get the allegations of, well, what happened to those two bins of, you know, absentee ballots that were found in some warehouse. Okay, that the United States Postal Service never delivered. Right. You know, that's when you get all of those, you know conspiracy, if you will, allegations of this election was stolen from X candidates and their supporters. Then the other thing to be aware of Nia, and you briefly mentioned this. And this is part of my worst case scenario as somebody who studies in the Supreme Court and studies constitutional law. If we do not get a replacement for Justice Ruth Bader Ginsburg on the Supreme Court. We have eight justices. Now, I'm not a math major but eight is an even number. Which could lead to four four tie votes. And for those of you who don't know this when the Supreme Court ends up in a tie vote the lower court decision stands.

Nia Rodgers Right. Which is why before Brett Kavanaugh was confirmed, there were a bunch of cases, they didn't take because they were concerned voting would be a four, four and this question would not be settled. And they wanted to settle the question so they waited on those cases, until they got a fifth member. So, and they weren't even waiting to push them in one direction or another they were just waiting, so they could make sure it was settled. So if you had a if you had a Bush v. Gore in a season with eight justices, that would just be a mess. Oh my goodness, that would be a mess. Okay, well thanks for adding to my anxiety. Because I wasn't anxious enough. Could they... is there like you know how when the government when something big happens in the government, and it gets all weird. Like, I'm thinking The Kennedy assassination or The Challenger disaster, those, those things, we often have Commission's , that that sort of do independent work could, is it possible to have one of those in this nightmare scenario to try to settle things

John Aughenbaugh Yeah, the Commission that settled the Hayes Tilden election in 1876 was a Commission that was created by the United States Congress.

Nia Rodgers Okay, so it was like one of those. It was like the Warren Commission or one of the other commissions. Okay, yeah, there is the possibility that they could say, you know what, we're going to let a well I guess, partisan but theoretically not partisan group of people to try to settle this.

John Aughenbaugh Well, I mean, in there any. I mean, I've seen scholars, go ahead and pitch, you know, any number of Commission proposals. You know, the, the most recent

when I saw was from law professor Bruce Ackerman who went ahead and said Congress right now could create a Commission that is comprised of five Supreme Court justices two liberals two conservatives and have the Chief Justice. Okay, be the chair.

Nia Rodgers And they would just check for irregularities, yes, they're not deciding the votes, they're just they're just they...

John Aughenbaugh They would just be checking to make sure that what the states are doing comply with Federal Constitution federal law, but also state constitutions in state law.

Nia Rodgers That's not a bad solution.

John Aughenbaugh I don't think it's a bad solution at all. In fact, if they went ahead and put the Commission in place right now. It could settle a lot of these disputes, even before people cast their votes.

Nia Rodgers That's true. Like, it could settle the whether it's okay to naked on envelope your vote or like if you didn't have a witness. Is it still going to be like they could, they could make all those decisions, according to what's going on with state laws.

John Aughenbaugh And because it would be a special commission and not quote unquote a federal court, the Supreme Court would not be limited by its prohibition on not issuing advisory opinions.

Nia Rodgers Oh, so they could say hey states. If you want to fix this, you could do the following things. And that would be spiffy and it would help us get this work done.

John Aughenbaugh Exactly right.

Nia Rodgers Although I can't imagine J Rob ever saying something is spiffy but still

John Aughenbaugh No, but I mean I

Nia Rodgers Pay him if he did, I would.

John Aughenbaugh Or or for me, you know, if he went ahead and said, Hey, I'm calling BS on days.

Nia Rodgers Right, yeah, you know,

John Aughenbaugh In the language of the people who, you know, I was raised with I grew up with, you know, just cut right to the chase. Okay, yeah, I'm calling you know BS. Okay, don't do that. Right.

Nia Rodgers So who would you put on that 5 person Commission.

John Aughenbaugh Well, I mean, hey, if you want to satisfy the liberals. Okay. You go ahead and put Kagan and Sotomayor right Okay, you want to satisfy the Conservatives, you put Clarence Thomas and Sam Alito and because Chief Justice Roberts. Okay, has annoyed both conservatives and liberals, even though, let's be fair. He's a conservative but there. If there was one person in this country right now that even liberals would say this guy would at least have the guts to go ahead and tell a republican controlled state. What you did was wrong, it would be Chief Justice John Roberts.

Nia Rodgers Yeah, I think his, his. What of it. It's not a popularity rating, but it's like a respect rating or a trust rating is

John Aughenbaugh Public Approval. Yeah.

Nia Rodgers Public public approval. Thank you. public approval ratings and I think like Congress's public approval rating is below that of like mosquitoes with diseases and, you know, things like that. Like, it's really low. And the President is super low to his, his are hanging around there, somewhere around like 35% or something but John Roberts I would bet is actually fairly high because...

John Aughenbaugh And I think it is high.

Nia Rodgers Yeah he is seen as protecting the institution not protecting his personal opinions. Most of the time I think he's saying that way. And in this particular instance yeah but talk about stress man his, his hair would go white overnight. You know what I mean. Maybe, like, I'm sorry I have to sign off on You know all the lower court leave time. I can't, I can't, I don't have time for this. It would be perceived as as neutral a body is we're going to get

John Aughenbaugh Yeah, I mean, in the in their other proposals, I've seen where no current officeholder would be chosen, but a well established states people from both political parties could be on such a commission and you would also have federal judges on it. There any number of things that Congress can do because again it's Congress's role here in designing states accepting states electoral college votes and electoral college votes are predicated on you know vote outcomes within the states. Okay, so, you know, Congress has a role to play here. And I know you're tired of hearing me say this, but Congress needs to step up, Congress has constitutional authority here. You know the dead, the deadlines that

we discussed earlier in this podcast were created by Congress per its constitutional authority in regards to accepting the Electoral College votes from the states. So if we don't think that the states can get their act together before November. Congress could okay put in place some checks. Some safeguards okay they could do that. Okay. Now, do I think Congress will do that. No, but it could. Okay, it could

Nia Rodgers Can I just say that... I know this is a sad way to end this podcast but I'm going to go here. Anyway, I feel a little bit like we're one of those countries where they have to call him the UN and have them hold the vote because

John Aughenbaugh Yeah.

Nia Rodgers You know, I mean, it's like, guys, we need to stop acting like our vote system is so broken that we're freaking Belarus, we're not we're not Belarus, the system is not broken. If it is implemented properly. Yes, the system works. We just need to have faith in it and we need to make it as strong as it can possibly be. Are there influences? Of course there are. But, and are there irregularities, as you noted, yes, there are always going to be irregularities, but for the most part. You know, it can work. It's just that the polarization now is making me think, oh man, we're gonna be bringing the guys with the blue helmets to sit around and watch our elections, and that's just not a good situation for anybody.

John Aughenbaugh In the way your, your concluding this podcast episode is it would be. It's one of those great ironies, it would be so ironic. We had to have the United Nations okay with election observers when for decades, the UN turn to the United States okay to have elderly states people from this country, you know, with gravitas with, you know, impeccable reputations like Jimmy Carter okay like various members of the bush 41 administration to run around the world and be election observers. I mean, that would be one of those one of the one of the most hideous ironies, if that you know actually happened. Let's not have that happen.

Nia Rodgers Exactly. So I am I'm making a plea to The non congress people, I mean to the congress people who are not listening to this podcast. Please. Please just do this right, like it's doable and we can act like decent people to each other and we can get this, we can get this done safely and correctly. And not have to feel like we had another last slash stolen slash upsetting election because that's still in people's minds 20 years later. Yeah. And frankly, my heart can't take it. I'm making a personal plea, having lived under COVID now for the last seven months I need y'all to get it together. Yeah, that's what I'm going to do, by the way. You remember how we said we were going to write to congress people so that we could get on their mailing list.

John Aughenbaugh Yes.

Nia Rodgers I've decided that's what I'm going to write inside every one of my cards. Hey, y'all. Could you get it together, please. Thanks. XO XO Nia

John Aughenbaugh And by the way Nia, this is my plea to listeners. Okay. If somebody submits a ballot, that doesn't have a signature or they didn't put it into the second envelope. It's not because they were trying to commit voter fraud. Okay, they're are a human being that made a mistake, right. Hey, lets not immediately jump to the part is in there trying to scam. The system they're trying to hurt my preferred candidate. Yeah. You're talking about, okay, this podcast. Okay, has to, you know, reasonably intelligent human beings with multiple advanced degrees. Who've demonstrated that they can follow instructions. And guys, you should have heard us before we started recording on the confusion. Okay, about how to mail an absentee ballot in our state, right.

Nia Rodgers Let's assume assume ignorance innocent ignorance over malice every time. Because that is 99% of the time. That's what's going to be the case that it is that is an innocent mistake, it is not intended malice.

John Aughenbaugh Or guys...

Nia Rodgers Honestly, people aren't out that much to get you.

John Aughenbaugh If you are having a hard time conceptualizing what we are saying right now at this point in the podcast. Think about the mistakes you have made on filling out other government forms for things like renewing your drivers lobby since

Nia Rodgers Oh my gosh. I was standing there, I have, I have two advanced degrees over standing there. And the woman said, Is your last name Stephanie? And I said no. And she said here and she wrote an arrow. between the first and the last name sections because I just did it the way almost every form half which is last name and then first name. I just did. I didn't even read it. I just filled it out thinking I knew what I was doing. And, you know, and she was very kind and I still got my driver's license because people recognize that other people are human.

John Aughenbaugh Yes, the number of times folks that I've had okay clerks at multiple state DMV. Okay, take pity on me and correct the mistakes I made and it wasn't because I was trying to scam. The system or I was trying to get one over or that I should have been granted a driver's license. It was just that. Okay. I was tired and some instances, or I didn't follow the instructions or the instructions were unclear to me. Okay. And again, I have multiple degrees. Okay. I read arcane, if you will, you know, legal documents and you know in government regulations and some of the stuff confuses me. So please, please, please do not immediately jump to the conclusion that because somebody went ahead and sent their ballot to the wrong place. Or they showed up late or they weren't entirely sure that their

absentee ballot got mailed so they showed up in person to vote that they're trying to, you know, hurt you, your party or your candidates. Please don't. Right. Okay. A lot of this stuff is human error, right there.

Nia Rodgers Give the grace that you need for yourself. because we all need it and we all need to give it. Yes.

Thank you. Okay. Sure. I'll talk to you next week. All right. Bye bye.

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